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No. 83-942

IN THE

Supreme Court of the United States

October Term, 1983

RIPLEY COUNTY AREA PLAN COMMISSION,

Petitioner

vs.

MELVIN ROUSE, RALPH D. AILES, ELIZABETH J. AILES, DECATUR COUNTY AREA PLANNING COMMISSION,

Respondents.

PETITIONER'S REPLY BRIEF

Stephen T. Taylor
EATON & TAYLOR
120 South Main Street
P. O. Box 275
Versailles, Indiana 47402
(812) 689-5111

Mark Dall
Counsel of Record
CITY-COUNTY LEGAL DIVISION
1601 City-County Building
Indianapolis, Indiana 46204
(317) 236-4055

Central Publishing Company, Inc., Indianapolis, IN 46206

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In a desperate attempt to evade review of the substantial constitutional issue posed by the petition for certiorari, Respondent Melvin T. Rouse (hereinafter "Rouse") has suggested that the holding *sub judice* was bottomed on Article I, §21 of the Indiana Constitution. Thus it is urged that inasmuch as the judgment below was based on an independent and adequate state ground, this Court lacks jurisdiction to entertain the case.

This position is clearly untenable and cannot be squared with the "plain statement" rule recently enunciated by the

Court in *Michigan v. Long*, ___ U.S. ___, 103 S.Ct. 3469, ___ L.Ed.2d ___ (1983). Applying the analysis set forth therein to the facts at bar, it seems readily apparent that the opinion of the Indiana Supreme Court, which struck down amortization as *per se* "the taking of property without due process of law" (App. A-8), rests squarely on the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *Long*, this Court expressed dissatisfaction with its prior *ad hoc* method of dealing with cases that involved possible adequate and independent state grounds.

> "Although we have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds, we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue. In some instances, we have taken the strict view that if the ground of decision was at all unclear, we would dismiss the case. See, e.g., *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934). In other instances, we have vacated, see, e.g., *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 20 (1940), or continued a case, see e.g., *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945), in order to obtain clarification about the nature of a state court decision. See also *California v. Krivda*, 409 U.S. 33, 93 S.Ct. 32, 34 L.Ed.2d 45 (1972). In more recent cases, we have ourselves examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision that was reached. See *Texas v. Brown*, ___ U.S. ___, ___, 103 S.Ct. 1535, 1538, 75 L.Ed.2d 502 (1983) (plurality opinion)."

103 S.Ct. at 347.

Eschewing the lack of doctrinal consistency in this approach the Court forged the following test for determining whether an asserted non-federal ground

independently and adequately supports a state court judgment.

> "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

103 S.Ct. at 3476.

Judging from the four corners of the Indiana Supreme Court's opinion in this case, it fairly appears that said decision was in fact predicated upon the federal due process clause. Indeed, the precise holding of the case mirrors the language of that provision.

> "We hold, however, that an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without *due process of law*, and an unreasonable exercise of the police power." (App. A-8). (emphasis added).

Significantly, the wording of its state counterpart is substantially dissimilar. Article I, §12 of the Indiana Constitution reads in pertinent part: "[E]very man, for injury done to him in his person, property, or reputation shall have remedy by due *course* of law." (emphasis added). If the Indiana Supreme Court had intended to underpin its holding on state due process grounds it could easily have done so by insertion of the word "course" in place of "process" or by a specific citation to that section of the state constitution. Instead it employed terminology commonly associated with the federal constitution. Surely it was not an oversight on the part of the Indiana Supreme Court, the

ultimate expositors of state law, to cast its opinion in terms of "due process of law" rather than "due course of law".

Cognizant of the disparity in language between these two constitutional provisions, Rouse has instead anchored himself to Article I, §21 of the state constitution in an effort to buoy his assertion that the judgment below hinged on an independent and adequate state ground. That provision reads as follows:

> "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

It takes a very tortured reading of the instant opinion to suggest that the Indiana Supreme Court had this provision in mind when ruling that amortization was "a taking of property without due process of law". Rouse's proposition, tenuous at best, is considerably undermined by the fact that nowhere in the opinions of the Supreme Court or Court of Appeals was any mention made of this particular constitutional provision. See generally, *Texas v. Brown*, ___ U.S. ___, 103 S.Ct. 1535, ___ L.Ed.2d ___ (1983); *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977).

Apart from this seemingly fatal omission, it should also be noted that none of the state court cases cited by the Indiana Supreme Court as illustrating permissible zoning restrictions on non-conforming uses turned on whether such restrictions contravened Article I, §21. Moreover, both the Indiana Supreme Court and the Indiana Court of Appeals referred to an ALR annotation, see 22 A.L.R.3rd 1134 (1968), as setting out the majority and minority views regarding the constitutionality of amortization. Suffice it to say that none of the cases cited therein implicated Article I, §21.

Notwithstanding these glaring weaknesses in his

position, Rouse blithely surmises that "a fair reading of the opinions below of the Court of Appeals and Supreme Court of Indiana reveals that the judgments rested on an independent state ground———Article One, Section 21 of the Constitution of the State of Indiana...." (Brief in Opp., p. 8). Petitioner respectfully submits that it would be tantamount to repudiation of the recently announced "plain statement" rule for this Court to arrive at such a conclusion. Insofar as the instant state court decision does not indicate clearly and expressly that the Indiana Supreme Court relied upon Article I, §21 in crafting its opinion and where as here it fairly appears that the court moored its decision primarily on the federal due process clause, this Court should indulge the presumption that no independent and adequate basis was present.

While a state court is entirely free to read its own constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis adopted by this Court in favor of a different analysis of its corresponding constitutional guarantee, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), "it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. National Tea Co.*, 309 U.S. 551 at 557, 60 S.Ct. 676 at 679, 84 L.Ed. 920 at 924 (1940). On the basis of inferences as weak as those offered by Rouse this Court should not decline to review the federal question asserted to be present. That the Indiana Supreme Court might have, but did not, invoke the state constitution does not foreclose jurisdiction here. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685 (1938).

In short, the jurisdictional prerequisite for review of the Indiana Supreme Court's decision in this case has been met. Moreover, the importance and substantiality of the question presented in the petition for certiorari have not

been denied by Rouse nor has he even addressed the fact that this decision is at odds with numerous cases across the country that have upheld amortization under the federal due process clause. For all of the foregoing reasons, Petitioner reiterates its plea that a writ of certiorari be issued to review the judgment and opinion of the Indiana Supreme Court.

Respectfully submitted,

Stephen T. Taylor
EATON & TAYLOR
123 South Main Street
P. O. Box 275
Versailles, Indiana 47402
(812) 689-5111

Mark Dall
Assistant Corporation Counsel
CITY-COUNTY LEGAL DIVISION
1601 City-County Building
Indianapolis, Indiana 46204
(317) 236-4055

Counsel for Petitioner